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NO. 204

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In the Supreme Court of the United States

OCTOBER TERM, 1950

CAPITAL TRANSIT COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 6-8) is reported at 87 F. Supp. 94. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 27-35) is reported at 183 F. 2d 825.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1950 (R. 36). The petition for

a writ of certiorari, filed on July 18, 1950, was granted on October 9, 1950 (R. 39). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Tort Claims Act authorizes impleading the United States as a third-party defendant.

2. Whether the Tort Claims Act subjects the United States to liability for contribution to a joint tortfeasor.

STATUTE AND RULE INVOLVED

Pertinent portions of the Federal Tort Claims Act, in its original form (60 Stat. 842, 28 U.S.C., 1946 ed., 931 *et seq.*),[1] and Rule 14(a) of the Federal Rules of Civil Procedure are set forth in the Appendix to the Brief for the United States in *United States* v. *Yellow Cab Company*, No. 218, this Term.

STATEMENT

On June 9, 1949, Kenneth Neil Stradley brought suit against the Capital Transit Company, petitioner here, for personal injuries he had allegedly received, on or about August 4, 1947, when one of petitioner's streetcars aboard which he was a passenger collided with a jeep owned by the United States. Alleging that the collision had resulted

[1] See note 1, p. 2, in the Brief for the United States in *United States* v. *Yellow Cab Company*, No. 218, this Term.

from the negligent operation of the streetcar by petitioner's employee, the complaint demanded judgment against petitioner for $50,000 plus costs. In accordance with Rule 38(b) of the Federal Rules of Civil Procedure, the plaintiff demanded a jury trial. (R. 1-3.)

Before answering, petitioner moved for leave to make the United States a party to the action and to serve upon the United States a third-party complaint (R. 3). Pursuant to an order granting this motion (R. 4) petitioner served its third-party complaint alleging that the jeep involved in the collision was being driven at the time by a United States soldier in the course of his employment and that the soldier's negligence had been the "sole or contributing cause" of the collision (R. 3-4). The third-party complaint demanded judgment against the United States "for a contributable portion of any sum" which might be awarded against petitioner in favor of the allegedly injured plaintiff, Stradley (R. 4).

The United States moved for dismissal of the third-party complaint on the ground that it failed to state a claim upon which relief could be granted (R. 5). In an opinion filed on October 26, 1949 (R. 6-8), the district court held that there was nothing in the Federal Tort Claims Act "constituting a waiver of immunity in respect of claims against the United States for contribution in actions in tort" (R. 7). Moreover, the court held,

decisions barring joinder of the United States with other defendants in suits predicated upon the Tort Claims Act supported its view that there was no jurisdiction for "the impleading of the United States as a third-party defendant solely for contribution" (R. 7-8). Accordingly, the court granted the motion and dismissed the third-party complaint (R. 8-10).

On appeal to the court below, the judgment of the district court was affirmed (R. 36). Holding "that the United States has not consented [in the Tort Claims Act] to be joined either as a co-defendant or as a third party defendant in a suit between private litigants" (R. 30), the court deemed it unnecessary to decide whether the right of contribution might be enforced against the United States in a separate action. Its affirmance, therefore, was declared to be "without prejudice to the maintenance of such a suit" (R. 35).

ARGUMENT

The questions presented in this case are the same as those presented in *United States* v. *Yellow Cab Company*, No. 218, this Term.[2] The brief for the

[2] In Pennsylvania, where the *Yellow Cab* case arises, contribution among tortfeasors is allowable by statute. 12 Pa. Stat. (Purdon) § 2081. In the District of Columbia the same result has been achieved by judicial decision. *George's Radio* v. *Capital Transit Co.*, 126 F. 2d 219 (C.A.D.C.); *Knell* v. *Feltman*, 174 F. 2d 662 (C.A.D.C.). It may be noted, in passing, that the Pennsylvania statute authorizing contribution is in effect merely a legislative affirmation of a rule

United States in the *Yellow Cab* case develops the reasons and authorities which we submit establish the correctness of the decision below in the instant case. Accordingly, we undertake here to deal only with two of petitioner's contentions which merit brief additional comment.

1. Petitioner suggests (Br. 9-10) that impleading the United States on a claim for contribution is permissible because it is not proscribed by any of the twelve exceptions in Section 421 of the Tort Claims Act (60 Stat. 845, now 28 U.S.C. 2680). If the Act elsewhere provided, either expressly or by implication, the requisite consent to both joinder and contribution, then there would be some point in urging that this consent was not withdrawn or disclaimed by any of the exceptions in Section 421. If, however, as we believe is clearly the case, the Act neither authorizes nor is consistent with petitioner's third-party action, then the argument premised on Section 421 is obviously fallacious. The absence of congressional consent to third-party suits for contribution cannot be supplied by the announcement of limitations upon the consent granted to suits on tort claims.

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which had earlier been announced in *Goldman* v. *Mitchell-Fletcher Co.*, 292 Pa. 354. See *Fisher* v. *Diehl*, 156 Pa. Super. 476, 482. The important point here, however, is that, regardless of any difference in source, the applicable local law is the same in Pennsylvania as in the District of Columbia, so that, in this as in every other presently material respect, No. 218 and the instant case are identical.

Actually, the twelve exceptions enumerated in Section 421, far from aiding petitioner, point up the correctness of our view that such a quasi-contractual claim as one for contribution is not encompassed by the Act. Examination of these exceptions reveals that they exclude varieties of *tort claims*—(1) claims based upon torts arising out of specified types of governmental activity (subsections (a), (b), (c), (d), (e), (f), (g), (i), (j), (l) of Section 421); (2) claims based upon intentional torts (subsection (h)); and (3) claims arising in a foreign country (subsection (k)). Throughout the long history which led to the Tort Claims Act, it was repeatedly recognized that the proposed exceptions were to exclude "certain classes of torts" from the authorization of suit on "tort claims." H. Rep. No. 2428, 76th Cong., 3d Sess., p. 2; H. Rep. No. 2245, 77th Cong., 2d Sess., p. 5; H. Rep. No. 1287, 79th Cong., 1st Sess., p. 1; Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 76th Cong., 3d Sess., on H. R. 7236, p. 22. As we have shown in our brief in *United States* v. *Yellow Cab Company*, No. 218 (pp. 32-45), claims for contribution are not tort claims. Their inclusion among the exceptions in Section 421 would, therefore, have been pointless.

2. Equally without merit is petitioner's argument (Br. 11) that the court below should have been persuaded by decisions allowing joinder un-

der the Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 525, 46 U.S.C. 741, *et seq.*) rather than by the prohibition against joinder in suits under the Tucker Act. The defect in this contention is its tacit assumption that the choice of analogy is free and at large, a matter for conjecture and fresh value judgment. Congress has, however, already made the admittedly legislative decision, announcing in terms which leave no room for doubt that the Tort Claims Act was to be assimilated to the Tucker Act, as construed by this Court in *United States* v. *Sherwood*, 312 U. S. 584, and that joinder was therefore to be impermissible. See Brief for the United States in *Yellow Cab*, No. 218, pp. 10-13.

On the other hand, Congress has in effect accepted and confirmed the view that the rule in admiralty should be different. Five years after enactment of the Suits in Admiralty Act, Congress enlarged the waiver of immunity to admiralty suits by passing the Public Vessels Act (Act of March 3, 1925, c. 428, 43 Stat. 1112, 46 U.S.C. 781 *et seq.*) under which suits are "subject to and proceed in accordance with the provisions of * * * [the Suits in Admiralty Act] insofar as the same are not inconsistent * * * ." Section 2, 46 U.S.C. 782. Section 1 of the Public Vessels Act 46 U.S.C. 781) expressly authorizes, not only "[a] libel in personam in admiralty * * * against the United States," but also "a petition impleading

the United States * * * ." Congress might have spelled out the same inclusive jurisdictional grant in the Tort Claims Act. Instead, it indicated an unmistakably contrary intent.

The decision to forbid joinder under the Tort Claims Act, while allowing it under the Suits in Admiralty and Public Vessels Acts, is warranted by the differences between the two fields of law and reflected in the differences between the two statutory schemes. For example, the absence of a jury from admiralty suits makes it unnecessary to require special non-jury treatment for the Government. Consequently, the congressionally unforeseen and unintended difficulties of combining jury with non-jury trials under the Tort Claims Act (see Brief for the United States in *Yellow Cab*, pp. 16-19) present no problem in admiralty. Similarly, the assignment to the ordinary admiralty courts of jurisdiction over the United States as defendant suggests none of the complications posed by selection of the Court of Claims as an available appellate tribunal under the Tort Claims Act. *Id.*, pp. 19-21.

CONCLUSION

For the reasons set forth above and in the Brief for the United States in the *Yellow Cab* case, No. 218, it is respectfully submitted that the judgment of the court below should be affirmed.

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